

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**BARRY J. HARROLD**

Claimant

VS.

## BOEING MILITARY AIRPLANES

Respondent

AND

**AETNA CASUALTY & SURETY COMPANY**

Insurance Carrier

AND

**KANSAS WORKERS COMPENSATION FUND**

Docket No. 165,911

## ORDER

**ON** the 21st day of December, 1993, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Shannon S. Krysl, dated November 5, 1993, came on for oral argument by telephone conference.

## APPEARANCES

The claimant appeared by and through his attorney, Roger A. Riedmiller, of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Vaughn Burkholder, of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Cortland Q. Clotfelter, of Wichita, Kansas. There were no other appearances.

# RECORD

The record considered by the Appeals Board is the same as that listed in the Award of the Administrative Law Judge dated November 5, 1993.

## STIPULATIONS

For purposes of this appeal the Appeals Board adopts those stipulations listed in the Award of the Administrative Law Judge dated November 5, 1993.

## ISSUES

After stipulations, the issues remaining for decision by the Administrative Law Judge were:

- (1) Nature and extent of claimant's disability;
- (2) The amount of claimant's average weekly wage; and
- (3) Whether claimant should be awarded vocational rehabilitation benefits.

Although the transcript of the regular hearing indicates that claimant's entitlement to vocational rehabilitation benefits was made an issue, this issue was, apparently inadvertently, not decided by the Administrative Law Judge. On appeal the parties do not dispute or present argument relating to the Administrative Law Judge's finding as to average weekly wage. The Appeals Board adopts the Administrative Law Judge's finding that the claimant's average weekly wage was \$747.65. The issues to be decided in this appeal are:

- (1) Nature and extent of claimant's disability; and
- (2) Claimant's entitlement to vocational rehabilitation benefits.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

- (1) Claimant has a 33 percent (33%) work disability.

Claimant injured his low back on April 30, 1992 in the course of his work for respondent, Boeing Military Airplanes, while he was operating a jackhammer and carrying out buckets of concrete from holes dug in the floor. After several visits to a chiropractor, claimant was sent to the physicians at Boeing Central Medical where he was examined and certain restrictions imposed upon his work. Specifically, the claimant was placed on a 20 pound weight lifting restriction and reassigned to a painting job. Although the claimant continued to work, his pain became worse. Boeing Central Medical referred him to Dr. Stephen Ozanne, who first examined claimant on May 22, 1992. Dr. Ozanne initially provided conservative treatment. He recommended a back brace and physical therapy. He continued the 20 pound weight limit restriction. On June 9, 1992, he ordered an MRI which revealed a large disk herniation. On December 17, 1992, Dr. Ozanne performed a hemilaminectomy and discectomy on the left at L5-S1. He found significant bulging at the time of surgery.

Two physicians testified and gave opinion regarding the nature and extent of claimant's permanent functional impairment. Dr. Ozanne, the treating physician, concluded claimant has a 10 percent (10%) functional impairment. Dr. Harsha, who examined claimant at claimant's request, testified claimant has an 18 percent (18%) permanent functional impairment. Both indicated they were rating pursuant to AMA Guides.

Both rating physicians also recommended restrictions. Dr. Ozanne recommended claimant limit his activities to lifting 75 pounds maximum on an occasional basis and 25 pounds on a frequent basis. He also recommended claimant limit climbing and overhead reaching. Dr. Harsha testified claimant should restrict his activities to the light category of work, avoid lifting, pulling, or carrying objects over 25 pounds and avoid using his arms out front with greater than 10 pounds. He concluded claimant could not perform the duties he had performed for respondent as a router.

Respondent argues that claimant's award should be limited to the functional impairment because claimant did return to work following the injury, was laid off as part of an economic lay off, and has not otherwise established a work disability greater than the functional impairment. Respondent's argument depends, in part, upon the presumption found in K.S.A. 44-510e that an injured employee has no work disability if he "engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury." Respondent claims this presumption applies because claimant did return following the injury to work at a comparable wage and the subsequent lay off was for economic reasons, not because of the injury.

The Appeals Board finds that the presumption is not conclusive in this case. K.S.A. 1992 Supp. 44-510e provides a definition of permanent partial general disability which was intended to award benefits based upon the claimant's loss of ability to earn a living, as measured by loss of access to the job market and loss of ability to earn a comparable wage, whenever that loss was greater than the functional impairment caused by the injury. That same statute provided a presumption that there was no such work disability where the claimant returned to work at a comparable wage. By this presumption it appears that the legislature intended to assure that the higher work disability be awarded only where the injury will, in fact, have an impact on claimant's ability to earn a living.

In Locks v. Boeing Company, 19 Kan. App. 2d 17 (1993), the Kansas Court of Appeals found that this presumption is a rebuttable one. Factors listed in that case as tending to rebut the presumption include the temporary nature of the post-accident work and an ongoing progressive health problem which may make the employment temporary. The evidence for rebuttal in this case is even stronger. Claimant's return to work is, at the time of this appeal, known to have been temporary. Whether laid off for economic or other reasons the claimant is now in the position of seeking other employment with restrictions from the injury which were shown by the evidence in this case to limit his access to the open labor market and impair his ability to earn a comparable wage.

It is true, as respondent points out, that Dr. Ozanne has given opinion that claimant could return to his previous employment. He did so, however, while at the same time giving restrictions which would have been violated by the work claimant was doing at the time of the accident. It also appears from the testimony that Dr. Ozanne was not fully aware of all of the claimant's job duties as a router when he gave that opinion. The Appeals Board notes also that Dr. Ozanne did testify that an occasional lift of greater than the 75 pound limit would not be something he would prohibit. Nevertheless, with the restrictions as initially stated by Dr. Ozanne, the even more severe restrictions recommended by Dr. Harsha, and the claimant's own testimony, the Appeals Board concludes that the evidence does establish claimant could not return to his work as a router and certainly not to the work he was doing in general maintenance at the time of the accident.

Two vocational experts testified as to work disability based upon restrictions recommended by Dr. Ozanne and the separate set of restrictions recommended by Dr. Harsha. Karen Terrill testified that if claimant could go back to Boeing there would be a zero percent (0%) wage loss. She testified, however, that he would otherwise have a probable 21 percent (21%) wage loss. From Dr. Ozanne's restriction she indicated she believed there would be an 11 percent (11%) loss of access to the open labor market. Jerry Hardin testified, from Dr. Ozanne's restrictions there would be a 15 to 20 percent (15-20%) loss of access to the open labor market and from Dr. Harsha's more severe restrictions there would be a 70 to 75 percent (70-75%) loss of access to the open labor market. The Appeals Board does, as is likewise indicated in the Administrative Law

Judge's initial Award, conclude that the restrictions recommended by Dr. Harsha are more limiting than necessary. Claimant did successfully perform work in excess of those restrictions after his surgery. The Appeals Board agrees that the credible medical evidence indicates claimant has the capacity to engage in at least a medium level of work and as such the Appeals Board agrees that claimant has a 20 percent (20%) loss of access to the open labor market.

The Appeals Board does, however, modify the finding by the Administrative Law Judge relating to loss of ability to earn a comparable wage. The Appeals Board finds that the loss of ability to earn a comparable wage is higher than that 26 percent (26%) found by the Administrative Law Judge. Karen Terrill testified that the loss of ability to earn a comparable wage would be 21 percent (21%) if he could not return to Boeing. She did so on the basis of a comparisons of \$10.73 per hour which she believed he could earn as a carpenter following the accident to the \$13.54 he was earning at Boeing. Jerry Hardin, on the other hand, compared \$541.60 per week pre-injury wage to a \$400.00 per week post-injury wage. The pre-injury wage did not include either overtime or fringe benefits. The projected post-injury wage was based upon the \$10.00 per hour or \$400.00 per week claimant earned in his employment with Kansas Siding after the accident. The Appeals Board finds it reasonable to compare the \$10.00 per hour post-injury employment with the pre-injury wage earned with respondent. However, the Appeals Board finds it reasonable to use the stipulated wage of \$747.65 per week which does include fringe benefits and overtime. The record indicates that employment with Kansas Siding was paid on a commission basis and the commission was all he was paid. The commission did not, in fact, yield as much as the \$10.00 an hour used for this comparison. On the other hand, there is some evidence that claimant can and will be able to earn the \$10.00 an hour here used. The Appeals Board therefore finds that the loss of ability to earn a comparable wage is 46 percent (46%) based upon a comparison of \$400.00 post-injury to \$747.65 earned with respondent.

The Appeals Board must consider and weigh both the reduction in the employee's ability to perform work in the open labor market and reduction in the ability to earn a comparable wage. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). Although it is not necessary to give each factor equal weight, the Appeals Board finds it reasonable to do so in this case. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). When the 20 percent (20%) loss of access is averaged with the 46 percent (46%) loss of ability to earn a comparable wage, the result is a 33 percent (33%) permanent partial general disability which the Appeals Board finds appropriate for the award in this case.

(2) Claimant is entitled to vocational rehabilitation benefits at respondent's expense.

The Administrative Law Judge did not, in her Award, rule on claimant's request for vocational rehabilitation benefits. The Appeals Board notes claimant has not returned to work at a wage comparable to that earned at the time of his injury. He has, as of the last deposition taken, worked at two jobs. He had difficulty performing the first and the last job worked paid \$6.00 per hour. Under the circumstances the Appeals Board believes that vocational rehabilitation benefits should be considered. The Appeals Board does, therefore, order that an assessment be done at respondent's expense. The action is also remanded to the Administrative Law Judge for determinations as to whether temporary total benefits should be paid and for such further proceedings, if any, as may be necessary relating to vocational rehabilitation issues.

#### AWARD

**WHEREFORE**, an award of compensation is hereby made in accordance with the above findings which does increase the amount of benefits awarded in favor of the claimant, Barry J. Harrold, and against respondent, Boeing Military Airplanes, and its insurance carrier, Aetna Casualty and Surety Company, and the Kansas Workers Compensation Fund, for accidental injury sustained on April 30, 1992 through his last day worked of June 2, 1990. For computation purposes, his last day worked will be used as the date of accident.

The claimant is entitled to 43 weeks temporary total disability at the rate of \$289.00 per week or \$12,427.00 followed by 372 weeks, less the number of weeks, if any, temporary total benefits are paid during vocational rehabilitation, at \$164.47 per week for a 33 percent (33%) permanent partial general body disability. As of February 21, 1994, there would be due and owing to the claimant 43 weeks of temporary total disability compensation at \$289.00 per week in the sum of \$12,427.00 plus 47 weeks permanent partial compensation at \$164.47 in the sum of \$7,730.09 for a total due and owing of \$20,157.09 which is ordered to be paid in one lump sum less any amounts previously paid. From and after February 22, 1994, there would be 325 weeks of benefits remaining to be paid. The Appeals Board has remanded this action to the Administrative Law Judge for a decision regarding whether it is appropriate to pay temporary total benefits during assessment and for such other proceedings as may be necessary relating to vocational rehabilitation. The weekly benefit of \$164.47 is, therefore, to be paid for 325 weeks less the number of weeks, if any, temporary total benefits are ordered and paid during vocational rehabilitation.

The claimant is entitled to unauthorized medical up to the statutory maximum upon presentation and proper proof of the amount spent.

Further medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed against the respondent and the Fund to be paid as follows:

**BARBER & ASSOCIATES**

Transcript of Preliminary Hearing	\$ 105.10
Transcript of Regular Hearing	\$ 332.65
<b>TOTAL</b>	<b>\$ 437.75</b>

**BARBARA J. TERRILL & ASSOCIATES**

Deposition of Jerry D. Hardin, M.S.	\$ 129.50
Deposition of Leland Holt	\$ 66.50
Deposition of Bryan Whitson	\$ 62.50
Deposition of Kevin Baslee	\$ 76.50
Deposition of Mark Mason	\$ 103.50
Deposition of Barry James Harrold	\$ 67.50
<b>TOTAL</b>	<b>\$ 506.00</b>

**LARRY SHALBERG & ASSOCIATES**

Deposition of William N. Harsha, M.D.	Unknown
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**BARRY J. HARROLD**

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**DEPOSITION SERVICES**

Deposition of Stephen Ozanne, M.D.  
Deposition of Karen Crist Terrill

\$ 340.00

\$ 247.20

**TOTAL**      \$ 587.20

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 1994.

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc:    Roger A. Riedmiller, 300 West Douglas, Suite 430, Wichita, Kansas 67202  
      Vaughn Burkholder, 700 Fourth Financial Center, Wichita, Kansas 67202  
      Cortland Q. Clotfelter, 747 North Waco, Suite 585, Wichita, Kansas 67203  
      Shannon S. Krysl, Special Administrative Law Judge  
      George Gomez, Director